RECENT CASES

CARRIERS—ELEVATOR PASSENGERS—CARE REQUIRED—PRESUMPTION OF NEGLIGENCE.—HELMLY V. SAVANNAH OFF. BLDG. CO., 79 S. E., (GA.), 364. —*Held,* that the relation between one owning and operating an elevator for passengers and those carried in it is similar to the relation between carrier and passenger which arises in the case of an ordinary common carrier of passengers. The exercise of extraordinary diligence is required in the transportation of passengers while in the elevator, and also in giving intended passengers reasonable opportunity to enter it, and if, in the operation of the elevator, an injury occurs to one who is a passenger therein, or who is entering it with the intention of becoming a passenger, on proof of the injury, a presumption of negligence arises against the owner.

Although spoken of by some courts as common carriers of passengers, *Treadwell v. Whittier,* 80 Cal., 574; *Springer v. Ford,* 189 Ill., 430, the owners and managers of passenger elevators cannot properly be so classed. This will be seen when the nature of the business of operating a passenger elevator is considered, for the proprietor of such owes no duty to the public to accept all who offer themselves for transportation, and who stand ready to pay the legal fare, and comply with his reasonable rules and regulations. *Seaver v. Bradley,* 179 Mass., 329; see also *Hutchinson on Carriers,* (3d ed.) sec. 100. Nevertheless, with reference to the safety of their passengers, the law has imposed on the owner of passenger elevators duties precisely similar to those exacted of passenger carriers by railroads. So, they are bound to exercise the highest degree of care and diligence in and about the operation of such elevators that is practicable, to prevent injury to passengers being carried therein. *Beidler v. Branshaw,* 200 Ill., 425; *Kentucky Hot. Co. v. Camp,* 97 Ky., 424; *Goodsell v. Taylor,* 41 Minn., 207. So, too, the obligation to those attempting to become passengers is the same, and the highest degree of precaution and care must be used not to injure them while entering the elevator. *Morgan v. Saks,* 143 Ala., 139; *South. Bldg. & Loan Ass'n. v. Lawson,* 97 Tenn., 367. And the same degree of care in the construction and repair of the elevators must be exercised as is required in the construction and repair of an engine or other machinery of railway transportation. *Oberfelder v. Doran,* 26 Neb., 118. But in Michigan, New York and Rhode Island, a different rule of liability is enforced. In these jurisdictions one maintaining a passenger elevator is not held to the care required of a common carrier; all that is required of him is that he exercise reasonable care and prudence as to the construction and operation of the same. *Burgess v. Stowe,* 134 Mich., 204; *McGrell v. Buffalo Off. Bldg. Co.,* 153 N. Y., 265; *Edwards v. Manufacturer's Bldg. Co.,* 27 R. I., 248. The basis on which these decisions are put is that the owner of a passenger elevator receives no compensation for the carriage, and that the right of any person to be carried is based on the implied invitation to enter which the owner of the property is deemed to extend to all with business on the premises. To such persons the law

imposes on the owner the duty to see that the premises are in a reasonably safe condition. See *Griffen v. Manice,* 166 N. Y., 188. But this reason is illogical, as the compensation of the owner comes from the increased rent charged for such conveniences. In all jurisdictions, the falling of the elevator, or the breaking of the machinery or appliances by which it is operated, raises a *prima facie* presumption of want of care on the part of the one having control thereof, and responsible for its safety. *Treadwell v. Whittier, supra; Edwards v. Manufacturers' Bldg. Co., supra; Fox v. Philadelphia,* 208 Pa., 127. As between the two rules, the better one would seem to be that upheld by the weight of authority, as there is no distinction in principle between the degree of care that should be required from a carrier of passengers horizontally, by means of railway cars, and one who carries them vertically, by means of an elevator. The holding in the principal case is sound and in accord with the better rule.

CARRIERS—PASSENGERS—CARETAKER.—ST. LOUIS & S. F. Co. v. NICHOLS, 136 P. (OKLA.), 159.—Plaintiff shipped horse on defendant's road and shipping contract set out that a caretaker would be given free passage, but since in plaintiff's case charge was made by hundredweight and not by carload, he in fact was not entitled to free passage. Plaintiff did not know this and in good faith applied to the conductor of the freight train, who allowed him to ride in the caboose, where he was injured. *Held,* that it was within the apparent scope of the conductor's authority to give such permission and therefore the plaintiff was a passenger.

A master is bound by the act of his employe or servant only if the act is within the actual or apparent scope of his authority. *L. & N. R. Co. v. Scott's Adm.,* 108 Ky., 392. So there arises a *prima facie* presumption that one riding on a passenger train is a passenger and that one riding on a freight train is not. *Bergan v. Central Vt. Ry. Co.,* 82 Ct., 574; *Purple v. Union Pacific Ry.,* 114 Fed., 123. There also arises the presumption that a freight conductor has no authority to permit any one to ride as a passenger. *Waterbury v. N. Y. C. & H. R. Ry.,* 17 Fed., 671. But if there exists a custom for freight conductors to carry passengers and the railroad permits it, they are liable to one who *bona fide* rides as a passenger. *Waterbury v. N. Y. C. & H. R. Ry., supra.* Or where the traffic, freight and passenger, is by same trains, a conductor may create the liability even though no passengers were allowed on that particular train. *Lucas v. Milwaukee & St. Paul R. Co.,* 33 Wisc., 41. There are cases which hold that the mere appearance of the freight train is enough to put one on notice that the conductor has no authority to accept anyone as a passenger, particularly where the traffic was not intermingled in any way. *Eaton v. Del., L. & W. R. Co.,* 57 N. Y., 382. Even in such a case the acceptance of a passenger, if it can be brought within the apparent scope of the conductor's authority as a freight conductor, would bind the master. *Lawson, Adm. v. Chicago, St. P., M. & O. Ry. Co.,* 64 Wisc., 447. The question then would be whether under the circumstances it was reasonable to suppose that the conductor had such authority. *Purple v. Union Pac. Ry. Co.,* 114 Fed., 123. Where there is a custom to carry a caretaker as a passenger

on a freight train to care for live stock the shipper would have a right to suppose that whoever was in charge of the train had authority to accept him as a passenger where there was no contract entered into for his passage. *L. S. & M. S. R. Co. v. Brown,* 123 Ill., 162. Such an act would be within the apparent scope of the conductor's authority in managing and controlling the train. *Lawson, Adm. v. Chicago, St. P., M. & O. R. Co., supra.* In the principal case the terms of the shipping contract were very properly used to show a custom to carry a caretaker and ground for the plaintiff's *bona fide* belief in his right to a passage and the conductor's authority to accept him.

EVIDENCE—ADMISSIBILITY OF PHOTOGRAPHS.—ZANCANELLA V. OMAHA & C. B. ST. R. Co., 142 N. W. (NEB.), 190. The plaintiff was injured after alighting from defendant's trolley car by being run over by another car on a parallel track. Trial court refused to allow defendant to introduce four photographs of the scene of the accident on the ground that it was capable of verbal description. *Held,* that this ruling was erroneoues because photographs may come in at the discretion of the trial court and are not excluded because the place may be verbally described.

Any plan or picture or photograph made by the hand of man is admissible in evidence if verified by proof that it is a true representation of the subject. *Blair v. Inhabitants of Pelham,* 118 Mass., 420. A lapse of time before taking the photograph makes no difference if the changes are trivial and are explained. *Dyson, Adm. v. The N. Y. & N. E. R. Co.,* 57 Conn. 9; *Dederichs v. The Salt Lake City R. Co.,* 13 (Utah) Tanner, 34. But some courts have held that the *locus in quo* must be the same in the picture as at the time of the accident. *Columbia & P. D. R. Co. v. The State to the Use of Huff,* 105 Md., 34; *C. C. C. & St. L. R. Co. v. Monaghan,* 4 Ill. App., 498. It is, however, universally held that the pictures must be a fair representation and must be verified by competent witnesses. *Cowley v. People,* 83 N. Y., 464; *Archer v. The N. Y., N. H. & H. R. Co.,* 106 N. Y. App., 589. Alone they are testimonial nonentities—they must come in on the credibility of some witness. *Wigmore on Evidence,* Vol. I, sec. 790. The decision of the trial court is subject to review on appeal. *Archer v. The N. Y., N. H. & H. R. Co., supra; Otis v. The State,* 30 Fla., 256. But in Massachusetts the decision of the trial court in regard to photographs is not open to exception. *Blair v. Inhabitants of Pelham,* 118 Mass., 420; *Commonwealth v. Coe,* 115 Mass., 481. The principal case is in accord with the weight of authority in leaving the question of admissibility to the trial court subject to review.

EVIDENCE—RES GESTAE—STATEMENT OF INJURED PERSON.—GREENER V. GEN. ELECTRIC Co., 102 N. E. (N. Y.), 527.—In an action for the death of an empoyee caused by falling from a ladder, his statements, while lying on the floor after falling, in response to an inquiry as to what had happened, that his feet were broken and that the ladder bent over, were not admissible, since the declarations of an injured person are admissible only

when they are so spontaneous or natural as to exclude the idea of fabrication, and not when they are in the nature of a narrative of what had happened.

Declarations of an injured person are not admissible as evidence unless they form part of the *res gestae*. *Collins v. State,* 46 Neb., 37; *Harness et al. v. Harness et al.,* 40 Ind., 384. To be part of the *res gestae* the declarations must have been made at the time of the act done which they are supposed to characterize, and have been calculated to unfold the nature and quality of the facts they were intended to express and so harmonize with them as obviously to constitute one transaction. *Enos v. Tuttle,* 3 Conn., 247; *Metchum v. State,* 11 Ga., 615. They need not be exactly coincident, in point of time, with the principal fact. *People v. Vernon,* 35 Call., 49; *Davids v. People,* 192 Ill., 176. But they should be so near as to suggest absence of any fabrication, and it should appear to be spontaneous and not the relation of a past transaction. *Ford's Case,* 40 Tex. Cr. Rep., 280; *State v. Lockett,* 168 Miss., 480. If the declarations are simply the narrative of a past event they do not form part of the *res gestae* and are not admissible. *Binnis v. State,* 57 Ind., 46; *Lund v. Inhabitants of Tyngsborough,* 9 Cush., 36. The rule of *res gestae* is well established, but courts have differed in its application. Some courts have held declarations of the deceased made after the injury, but in the absence of the defendant, were inadmissible. *Hall v. State,* 132 Ind., 317; *People v. Ah Lee,* 60 Cal., 85. There are some authorities which hold the declarations must be confined to such expressions and exclamations as furnish evidence of a present existing pain or malady. *Ins. Co. v. Mosley,* 8 Wall., 397, Clifford, J., *dissented.* If the deceased made statements at the instant of the injury, the subsequent statements have been held admissible as being a continuation of the sentence uttered at the instant of the injury. *State v. Martin,* 124 Mo., 529; *Johnson v. State,* 8 Wyom., 494. Statements made from five to sixty minutes after the accident have been held not admissible as part of the *res gestae. Steinhofel v. C. M. & St. P. R. Co.,* 92 Wis., 123; *Richmond & D. & R. R. Co. v. Hammond,* 93 Ala., 181; *M. C. R. Co. v. Womack, Adm.,* 84 Ala., 194; *People v Wong Ark,* 96 Cal., 125. There is a good deal of authority *contra. Hanover R. Co. v. Coyle,* 55 Pa. St., 396; *Comm. v. John McPike,* 3 Cush., 181; *Rex. v. Foster,* 6 C. & P., 325. In criminal actions the authorities are about equally divided in the application of the rule. In civil actions the courts seem to favor the holding of the principal case. There seems to be no sound reason for the distinction. If from all the circumstances the exclusion of the evidence would work an undue hardship on the injured party, and enable the accused to escape from what otherwise is a just liability, the evidence should be admitted.

FRAUDS, STATUTE OF—SALE OF LAND—RECEIPT OF PURCHASE MONEY.—ROHRBACH V. HAMMILL, 143 N. W. (IOWA), 872.—Under sections 4625-4626 of the Code providing that contracts for the transfer of an interest in land must be in writing except where the purchase money or a part thereof has been received by the vendor, it was *held,* that the court did not err in instructing that plaintiff could recover for the breach of a parol contract

to transfer land if the jury should find that a certain check for $500 was given and accepted as part of the purchase price where there was evidence from which the jury could find that the check was so given and accepted.

"Purchase money" required by the statute has been defined as anything of value which the parties agree on and which the seller is willing to accept in payment. *Johnson v. Taylor,* 101 Miss., 78; *Benjamin on Sales,* sec. 194. The acceptance must be unconditional and in absolute discharge of the obligation. *Leonard v. Roth,* 164 Mich., 646. The provision of the statute is on the ground of public policy and cannot be waived by the parties—*something* must be given in earnest. *Groomer v. McMillan,* 143 Mo. App., 612. A check given and accepted in payment and cashed has been held to be a part payment. *Hunter v. Wetsell,* 17 Hun., 135; *Johnson v. Morrison,* 163 Mich., 322. But a check received by the vendor but not cashed was not enough to satisfy the statute. *Groomer v. McMillan,* 143 Mo. App., 612. In such a case there is an implication of law that the check is not to constitute the absolute payment required by the statute until it is paid, or the loss thereon results from the unreasonable delay of the holder in presenting it for payment. *Groomer v. McMillan, supra.* But by an express agreement to receive the check in absolute payment the mere transfer of it may be sufficient even thought it is afterwards not paid. *Logan v. Carroll,* 7 Mo. App., 613; *Hunter v. Wetsell,* 17 Hun., 135. The decision in the principal case seems to be well within the authorities in submitting to the jury the question of an express agreement on the part of the defendant to accept the check in absolute payment and discharge of the purchase price.

ORDINANCE—CONSTRUCTION—SUBSTITUTION OF ONE WORD FOR ANOTHER.—PEOPLE OF THE STATE OF NEW YORK V. FRUDENBERG. New York Court of Appeals. Decided Oct. 21, 1913. Martlett and Miller, JJ., *dissented.* The provisions of the Sanitary Code of the City of New York making it a misdemeanor for any person to "receive *or* have" in his possession any receptacle used in the transportation of milk or cream which has not been washed and cleansed immediately after emptying, is to be read "receive *and* have in his possession". As thus construed the provision violates no constitutional right and is within the police power of the state.

Ordinances enacted by a municipality, in its favor, and against persons bound thereby, have the force of laws passed by the legislature of the state. *People ex rel. Lodes v. Dept. of Health,* 117 N. Y. App. Div., 856; *Dillon, Mun. Corp.,* 5th ed., Vol. II, sec. 573. The rules for the construction of ordinances are the same as for statutes. *Matter of Yick Wo,* 68 Cal., 294; *Denning v. Young,* 62 Kan., 217. But ordinances are especially entitled to a reasonable construction. *Whittock v. West,* 26 Conn., 406. Statutes must be construed so as to be consistent with justice and the dictates of natural reason, though contrary to the strict letter of the law. *Ham v. M'Claws and Wife,* 1 Bay (S. C.), 93. Courts will never adopt a construction that makes the statute violate the Constitution if any other is susceptable from the words. *Standard Oil Co. v. Comm.,* 119 Ky., 75. The construction must, if possible, be such as will enable the statute to

have effect, *Dow v. Harris,* 4 N. H., 17, provided the construction is reasonable. *Robson v. Doyle,* 191 Ill., 566. If a statute is capable of two constructions, one of which is in harmony with the Constitution and the other not, the former should be adopted. *Harmon v. City of Chicago,* 140 Ill., 374. If absurd consequences or those manifestly against common reason arise collaterally out of a statute, it is void *pro tanto,* 1 Harper (S. C.), 101. It is difficult to sustain the holding of the principal case. The generally accepted rules for construing statutes and the authorities cited in the opinion do not fully sustain the decision. In *Rome v. Phillips,* 24 N. Y., 463, cited in the opinion, a will and not a statute was before the court. In *Matter of Sugden v. Partridge,* 174 N. Y., 87, cited as an authority, the court held where a statute is capable of two constructions, the one which is in harmony with the Constitution should be adopted provided it is consistent with the legislative intent. In *Camp v. Rogers,* 44 Conn., 291, the court to give effect to a statute, defined the word "owner" to mean the person who had a special right of property in the thing for a particular purpose as well as the person in whom was vested the legal title. *People ex rel. Gas Co. v. Rice,* 138 N. Y., 151, comes the nearest to sustaining the principal case. The court in construing a statute enlarging the powers of gas and electric light companies, held the word "or" should be read 'and'" because it was clear from the whole act that if the word "or" was retained the statute would be inconsistent and contrary to the manifest intent of the legislature. On principle the dissenting opinion presents the sounder view. "No doubt," says Bartlett, J., "the ordinance could be reconstructed so as to be reasonable. * * * In my judgment we are without power, however easy it may be, to make a good ordinance instead of a bad one."

RAPE—VARIANCE—NAME OF PROSECUTRIX.—STATE V. DRAKEFORD, 78 S. E. (N. C.), 308.—Name of the prosecutrix was alleged in the indictment for rape to be *"Lila"* H., when the evidence showed that it was *"Liza"* H.—*Held,* that this at the most is an immaterial variance.

In all indictments for crime where the commission of a trespass against the person or property of another is a necessary ingredient, the name of the injured party, if known, must be stated. *State v. Pollock,* 105 Mo. App., 273. The reason for the rule is to identify the transaction so that the defendant may not be taken by surprise and may be able to protect himself against a second prosecution for the same offence. *State v. Moxley,* 41 Mon., 402. The misnomer must be of a party whose existence is essential to the offense charged. *U. S. v. Howard,* 1 Baldw., 293. A few cases have gone so far as to hold that a name must be proven "precisely" as laid. *Sullivan v. People,* 6 Colo. App., 458. But the generally adopted rule is that if the names are *idem sonans, i. e.,* if they may be sounded alike without doing violence to the powers of the letters in the variant orthography, then the variance is immaterial. *Ward v. State,* 28 Ala., 53; *Vance v. State,* 75 Ind., 460. The name used in the indictment may also vary from the name proved if it is a corruption, abbreviation or of the

same derivation as the latter and there is evidence that the person was generally known thereby. *Owens v. State,* 20 S. W., 558; *State v. Murberg,* 56 Wash., 384. *Wharton on Criminal Law,* Vol 1, sec. 260, says, "Any variance as to sound of the name of a material third party is fatal at common law." The principal case in holding the variance in the names to be immaterial even though they are not *idem sonans* seems to depart from a well established rule, and from the facts in the case it does not appear that such a holding was necessary to prevent an obstruction of justice.

WILLS—CONSTRUCTION—REPUGNANT CLAUSES.—IN RE MOORE'S ESTATE, 88 ATL. (PA.), 432.—*Held,* that where a clause of the testatrix's will bequeathed the "income from all my property" to be divided equally between M. and F. while they live, and at their death to be equally divided among their children, and a subsequent clause provided, "I will all my personal property to my beloved Aunt M., and at her death to go to her children L. and E.," that the later clause had reference to property about the person of the testatrix, and not the income producing property contemplated by the first clause, and hence there was no repugnancy in the will, and M. did not acquire the entire estate under the later clause.

In construing a will a court should give effect to every word of the will, without change or rejection, provided an effect can be given to it not inconsistent with the general intent of the whole will taken together. *Homer v. Shelton,* 2 Met. (Mass.), 202; *Ingersoll's Appeal,* 86 Pa. St., 240. But this intention is sometimes made doubtful through repugnancy between the several parts of the will. *Russell v. Hartley,* 83 Conn., 654; *Pickering v. Langdon,* 22 Me., 430. When such case arises the inconsistent clauses should be harmonized if possible so as to give effect to each clause. *In re Phillips,* 205 Pa. St., 504; *Matter of Title Guarantee, etc., Co.,* 195 N. Y., 339; *Jenks v. Jackson,* 127 Ill., 341. But where the clauses are entirely irreconcilable, so that they cannot possibly stand together, the clause which is posterior in local position shall prevail, the subsequent words being considered to denote a subsequent intention. *Jarman on Wills,* p. 436. But see *Day v. Wallace,* 124 Ill., 256, where it was held that where a testator in several parts of his will devised the same property to different persons, the two devisees took the property concurrently as tenants in common. To effectuate a clear intention, as apparent upon the whole will, words may be transformed, supplied, rejected, or changed. But none of these things can be done if there can be any rational construction of the words as they stand. *Gardener on Wills,* p. 376. Personal property is the right or interest, less than freehold, which a man has in realty, or any right or interest which he has in things movable. *Bouv. Dic.* The principal case goes far in trying to give effect to the intention of the testator. It is not probable, as the court says, "that she would give one-half thereof to Mrs. Foote and her children, and then intentionally take it away from them by the next stroke of the pen." But it is an exceedingly liberal, if not a forced construction, to hold that "personal property" in the later clause had reference merely to the property about the person of the testatrix.